

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 40 OF 2000.

Shri Chandrakant Budo Naik
Mayenkar, major of age,
Tailor, residing at House
No. X-81, Reis Magos,
Verem, Bardez, Goa.

.... Appellant/Original
Plaintiff.

Versus

1. Gopal Vishnu Naik Panvelkar.
2. Ganesh Vishnu Naik Panvelkar.
3. Narcinva Vishnu Naik Panvelkar.
4. Vithoba Vishnu Naik Panvelkar,
all major of age, landlords,
residents of Mansher,
Ribandar, Ilhas, Goa.

.... Respondents/Original
Defendants.

Shri S. M. Walwaikar, Advocate for the Appellant.

Shri Sudin M. Usgaonkar, Advocate for the Respondents.

CORAM: N. A. BRITTO, J.

DATE: 8th APRIL, 2005.

ORAL JUDGMENT:

This is plaintiff's Second Appeal arising from Civil Suit No.
239/1985/C.

2. This Second Appeal was admitted, but no substantial question/s of law
were framed. Heard Shri S.N. Walwaikar on behalf of the

appellant/plaintiff and Shri S.M. Usgaonkar on behalf of the respondents/defendants.

3. As per Shri Walwaikar questions (i), (iA) and (iii) as formulated in prayer E of the Memorandum of Appeal are substantial questions of law which are required to be decided by this Court in this Second Appeal. As per Shri Usgaonkar, the learned counsel of the defendants, none of the said questions arise when considered in the light of the law laid down by the Supreme Court in the case of ***Santosh Hazari v. Purushottam Tiwari (deceased by L.Rs. [(2001) 3 S.C.C. 179]***.
4. The dispute between the plaintiff and the defendants was regarding a small temple (deuli) and land surrounding it, admeasuring about 500 sq.m. of the property of the defendants. The defendants having been dispossessed of the said temple/land, the defendants filed Civil Suit No. 46/67 which was decreed on 31.7.1970 and in December, 1971 the defendants obtained possession of the said temple/land in execution proceedings. Subsequently, the Decree of the trial Court in Civil Suit No.46/67 was affirmed by the then Court of Judicial Commissioner on 25.2.76. The defendants had again filed another Civil Suit bearing No.137/81/A because as per the defendants, the plaintiff started interfering again in the said property and this suit was settled by filing

consent terms.

5. The plaintiff then filed this Suit i.e. Civil Suit No.239/85, from which this Second Appeal arises. In this suit the plaintiff, inter alia, prayed that the Judgment and Decree dated 31.7.70 in Civil Suit No. 46/67 be declared as null and void, the same having been obtained by fraud and also prayed for recovery of possession of the disputed property. The learned Trial Court by its Judgment/Decree dated 12.9.97 came to the conclusion that the plaintiff was not in possession of the suit property and further held that the plaintiff's possession was interrupted in 1970 and since then it is the defendants who were in possession of the disputed property/temple. The learned Trial Court further held that the suit was filed in the year 1985 after a period of 12 years and therefore it was barred by limitation. The learned Trial Court also held, and in my view rightly, that the plaintiff had neither pleaded particulars of fraud nor proved the same. The plaintiff having carried an appeal before the District Court, the learned Addl. District Judge dismissed the same by Judgment/Order dated 5.6.99. In my view the conclusions arrived at by both the Courts below could not be faulted. Firstly, the plaintiff had filed the suit for declaration that the Judgment/Decree dated 31.7.70 were obtained by fraud and any suit or declaration had necessarily to be filed within a period of three years which was not filed by the plaintiff. The

plaintiff could have succeeded in recovering possession of the property only in the event the plaintiff had succeeded in proving that the Judgment/Decree dated 31.7.70 were obtained by fraud but even then the plaintiff's prayer for recovery of possession was beyond the period of 12 years as provided by Art.64 of the Limitation Act. Shri Walwaikar also submits that the plaintiff had challenged the Judgment/Decree in Civil Suit No.137/81/A because, according to the learned Advocate Shri Walwaikar, reference was made to this Civil Suit in answer to better particulars given by the plaintiff and sought by the defendants. An answer given by the plaintiff to the better particulars sought by the defendants cannot be taken as one and the same thing as pleadings and prayers in the plaint and in the absence of necessary pleadings or prayers in this suit, it could not be said that there was any challenge to the Judgment/Decree in Civil Suit No.137/81/A.

6. Shri Walwaikar next submits that the learned trial Judge could not have given finding on merits once it was held that the suit was barred by limitation. However, the fact remains that the trial Court is required to render a finding on all issues in terms of Order 14, Rule 2 of C.P.C.
7. In my view, none of the questions sought to be raised as substantial questions of law do arise from the suit filed by the plaintiff namely R.C.S.

No.239/85/C which have been affirmed by the learned Addl. District Judge in Regular Appeal No.72/97.

8. I find there is no merit in this appeal. Consequently, the same is hereby dismissed with costs throughout to be paid by the plaintiff/appellant to the respondents/defendants.

N. A. BRITTO, J.

sl.